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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 514.

D. B. HEINER, Collector of Internal Revenue, 23rd District of Pennsylvania,

against

JOHN H. DONNAN et al.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF AMICUS CURIAE.

The brevity of the record and the statement of facts by the parties make it unnecessary to set them forth in this brief. They will be adverted to as necessary in the course of the argument.

The *amicus curiae* is the attorney for the taxpayers in the case of **Anderson v. Guinzburg**, No. 689, October Term, 1931, of this Court (51 Fed. [2d] 592; aff'd December 14, 1931, by the United States Circuit Court of Appeals for the Second Circuit *sub nom Guinzburg* v. *Anderson*). A petition for certiorari by the Government is now pending in this Court.

Summary of Argument.

The second sentence of Section 302 (c) of the Revenue Act of 1926 violates the due process clause of the Fifth Amendment and the application of the Revenue Act of 1926 to the gifts made by the decedent to his children violated the due process clause of the Fifth Amendment, because (a) there was no subject matter to be taxed,

(b) the tax was based on an unequal classification, and (c) procedural due process was denied in that the respondents were not permitted to show the true facts.

The Fifth Amendment applies to the taxing power of Congress.

The *Milliken* case and the section dealing with gifts actually made in contemplation of death are irrelevant.

The tax is not a gift tax and if it were it would be unconstitutional in the form in which it is enacted in the second sentence of Section 302 (c) of the Revenue Act of 1926.

POINTS.

I.

The assessment of the Estate Tax upon the gift made by the decedent to his son within two years of death was arbitrary and capricious, and the Revenue Act of 1926 in so far as it required the inclusion of the gift as part of the decedent's taxable estate, deprived the executors and the donee of property without due process of law and is unconstitutional and void.

The Act of Congress in Question.

The Estate Tax was determined pursuant to the provisions of the Revenue Act of February 26, 1926, Title 26, Sections 1091 *et seq.*, of the United States Code (44 Stat. 69).

Section 301 (a) of the Revenue Act of 1926 (U. S. C. A., Sec. 1092) provides that the tax is to be imposed upon the value of the net estate pursuant to the graduated schedule there set forth.

Section 303 of the Revenue Act of 1926, as amended by Section 401 (a) of the Revenue Act of May 29, 1928 (U. S. C. A., Sec. 1095), provides that the net estate shall be determined in the case of residents by deducting certain items there enumerated from the "gross estate." Gross

estate is defined by Section 302 of the Revenue Act of 1926 (U. S. C. A., Sec. 1094) and provides, among other things:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.
>
> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. **Where within two years prior to his death but after February 26, 1926, and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this chapter.** Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to February 26, 1926, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter."

It was under the authority of the second sentence (in black type) in the section just quoted that the Commissioner of Internal Revenue required the gift of the decedent to his children to be returned as a part of the estate (R. 1), and it was under that sentence that the gift was included in the gross estate and the additional assessment was made (R. 1-2).

Substantive Due Process—There Was No Subject Matter to Be Taxed.

It is to be noted that this *gift* was made *taxable* by the statute (a) although it was not a part of the estate, nor as a matter of fact made in contemplation of death; (b) at the value as of the date of death, although this was not necessarily the same value as at the date of receipt; (c) that the amount of the tax on this gift was not determined by the value of the gift itself, but by the amount of the entire net estate; (d) that the tax fell upon the interest of the beneficiaries in the estate and not upon the interest of the donee unless the estate were inadequate to pay the tax (Sec. 314, Revenue Act of 1926; U. S. C. A., Sec. 1114).

This Court has held that the Estate Tax is an excise tax, which attaches to the estate before distribution, on the right to transmit or on the transmission.

New York Trust Co. v. *Eisner*, 256 U. S. 345, 349.
Knowlton v. *Moore*, 178 U. S. 41.

With one exception, which will hereafter be discussed, this Court has always held that an estate tax can only be levied where some economic benefit of property, whether it be physical property itself or a power over property, passes or terminates or ripens by reason of death.

In *Nichols* v. *Coolidge*, 274 U. S. 531, it was held that a transfer made before death which "was in no proper sense testamentary" was not taxable. The gift was absolute, at least as to the property conveyed to the trustees.

In *Tyler* v. *United States*, 281 U. S. 497, it was held that the interest of a survivor in an estate by the entirety was taxable because "death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties'" (p. 502).

And in the same case the Court said, by Mr. Justice Sutherland, at page 563:

> "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. **Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death,** rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law." (Black type ours.)

In *Chase National Bank* v. *United States*, 278 U. S. 327, policies on the life of the decedent payable to others were held taxable because the decedent had reserved to himself the right to change the beneficiary. The Court said at page 338, through Mr. Justice Stone:

> "Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. *Chanler* v. *Kelsey*, 205 U. S. 466. * * * And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death. *Bullen* v. *Wisconsin*, 240 U. S. 625; cf. *United States* v. *Robbins*, 269 U. S. 315, 327; *Cohen* v. *Samuels*, *supra*." (Black type ours.)

Reinecke v. *Northern Trust Co.*, 278 U. S. 339, admirably illustrates the point here made. Two sets of trusts were involved. In the first set the testator in his lifetime conveyed property in trust, the income to be payable to himself and on his death the income to be paid to designated persons until the termination of the trusts, with remainders over. The settler reserved the power to himself alone to revoke the trusts, providing that upon the revocation of the corpus of the trusts must be returned to him. The settler died without having revoked the trusts. They were nevertheless held subject to the transfer tax.

But in the case of five other trusts created by the testator in his lifetime, he reserved the power to "alter, change or modify" each trust only by joint action of himself and the beneficiaries of the respective trusts or a majority of them. The trusts were not in contemplation of death. The Court held that these trusts were not taxable upon the death of the grantor. The reason for this is admirably stated by Mr. Justice Stone, pages 346-347:

> "**The shifting of the economic interest in the trust property which was the subject of the tax** was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax. * * *
>
> In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (Black type ours.)

The decision was based on statutory interpretation in order to avoid the necessity of determining at that time whether a tax could constitutionally be levied by the Government on gifts completed by the donor in his lifetime and not made in contemplation of death "where he has retained no such control, possession or enjoyment." The importance of the decision is its emphasis on "the shifting of the economic interest."

Perhaps the most important case to be considered is *Nichols* v. *Coolidge*, 274 U. S. 531. There the grantor made an absolute conveyance, without consideration, of real estate and personal property to trustees, who agreed to pay the income to the settlers and after their death to distribute the corpus among the settlers' five children or their representatives. Subsequently the settlers assigned to their children the entire interest in the property, including the right to income therefrom. This Court held that in so far as Section 402 (c) of the Revenue Act of 1919 (which was similar to the first sentence of Section 302 (c) of the Revenue Act of 1926) required that this property should be included in the gross estate of one of the grantors, it violated the Fifth Amendment. The Court said at page 540:

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. *The mere desire to equalize taxation cannot justify a burden on something not within congressional power.*"

On pages 542 to 543 the Court, while conceding the power of Congress to prevent evasion of taxes, recognized the arbitrary character of a tax the levying of which was dependent upon some future indeterminable occurrence and the amount of which was to be fixed by transfers unrelated in time and character to that upon which the excise was levied. The Court said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten

dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2d) 625.

This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushhdber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77. And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Nichols* v. *Coolidge*, it was really unimportant that the gift had been completed before the passage of the Act. What was of vital consequence was that the gift was complete before death which was the hour on which the tax obligation, whatever it might be, arose and the facts upon which death duties were predicated became crystallized.

Perhaps no case more clearly indicates the principle that an estate tax or inheritance tax is levied upon a change in economic status either by the termination or ripening or passage of a property right than does *Coolidge* v. *Long*, 282 U. S. 582. That case involved the precise trust under consideration in *Nichols* v. *Coolidge*. The tax in question was not, however, a Federal estate tax, but the Massachusetts inheritance tax. In other words, whereas *Nichols* v. *Coolidge* treated the Federal Government's right to tax transfers, *Coolidge* v. *Long* dealt with the right of the State to tax successions and reached the same conclusion as had been come to in the earlier case.

Coolidge v. *Long* is particularly valuable because the principal difference between the majority and minority opinions illustrates that the Court did not question the doctrine that it was the passage of some economic interest

that was the subject matter of the tax, but that the difference in viewpoint was the question of whether there was an actual economic change wrought by the death of the grantor. Thus Mr. Justice Butler, speaking for the majority, said at page 602:

> "The overwhelming weight of authority sustains the conclusion that the succession in the present case was complete when the deed took effect."

Mr. Justice Roberts, speaking for the minority, held that this doctrine was untenable, because, as he said on page 608,

> "It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest—that if it vested years ago, to tax the owner later, on the occasion of his coming into actual possession, control and enjoyment of the property, is in fact to tax him presently for the exercise of a privilege long since enjoyed."

In discussing the *Reinecke* case Mr. Justice Roberts went on to point out (p. 629):

> "Repeatedly throughout the opinion the passage of the control, possession and enjoyment of property is referred to as the touchstone of the incidence of the tax. If that be the test when the privilege of the transferor is under investigation, no reason is apparent why the same yardstick should not be used when we are considering the acquisition of rights by the beneficiary."

See also his discussion of *Saltonstall* v. *Saltonstall*, 276 U. S. 260, at pages 622 to 624.

The general rule illustrated by these authorities applies to this case, because the gifts by the grantor to his children were completed many months before death; the father never had the use or benefit of the property and the children at all times enjoyed the exclusive use and possession of the gifts (R. 1). There was nothing consequently that faded out or passed or fructified as the result of the donor's death.

The unfairness and the inequality of the statute are further evidenced by the fact that the gift is required to be taxed not at the value as of the date when it was made, but at a value which may fortuitously or through the acumen of the donee have been greatly increased. It is not the donee who then bears the burden, but the legatees of the decedent who have no interest in the gift and receive no benefit from its enhancement.

The language of Judge Learned Hand used in another connection in *Frew* v. *Bowers*, 12 Fed. (2d) 625, 630, is pertinent here. He pointed out that retroactive taxes imposed unexpected burdens but are permissible when measured and distributed in accordance with the taxpayer's wealth but where, as under the section there considered (and under the section here considered as well) taxes are distributed in accordance with *another's* wealth, "that is a far more grievous injustice." This thought is the basis of the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin*, decided at the present term on November 30, 1931.

Substantive Due Process—Unequal Classification.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, this Court held a Wisconsin statute which was almost identical with the section of the Act under consideration here to be violative of the Fourteenth Amendment and void. There the statute provided that a tax should be levied on transfers of property by will or in contemplation of death, and that any gift "made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."*

* The Revenue Act of 1926 was enacted three days *before* the decision in the *Schlesinger* case was handed down. Congress, therefore, did not have in mind any time distinction between the six-year period in the Wisconsin statute and the two-year period in the Federal Act.

This Court said at page 239:

> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, **while like gifts at other times are not thus treated.** There is no adequate basis for this distinction." (Black type ours.)*

In that case the Court discountenanced the inequality imposed by the tax because the decedent happened to die at a different time than his neighbor. This coincidence was something unrelated to the main fact of the giving away of substance, with death as the motivating force. Inequality resulted from the taxing in the name of a death tax of one transfer wholly unrelated to death while leaving tax free other transfers *inter vivos* equally unrelated to death.

This inequality is splendidly illustrated by the case of *Guinzburg* v. *Anderson, supra.* There the decedent paid one-half of the purchase price of a house given to his son for a home as a wedding present. The decedent died within two years of the gift and his estate was subjected to tax under the second sentence of Section 302 (c) of the Revenue Act of 1926. At the same time that the decedent paid one-half of this purchase price, his wife contributed an equal amount to the purchase price of the house which was their *joint gift.* The wife not dying within two years her estate is not subject to taxation. The coincidence of death is thus made the sole justification for this discrimination.

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* The *Schlesinger* case was followed by the Supreme Court of Kentucky, which declared a similar Kentucky statute unconstitutional in *State Tax Commission* v. *Robinson's Executors,* 234 Ky. 416, 28 S. W. (2) 491.

Under any canon of equality it is difficult to reconcile taxation which is affixed to the act of one joint actor and which does not obtain with respect to that of the other.

In the case of *Hoeper* v. *Tax Commission of Wisconsin*, decided by this Court November 30, 1931, *Schlesinger* v. *Wisconsin* was cited with approval in the majority opinion of the Court in such a way as to demolish two of the Government's arguments, (a) that separate estates can be combined for the purpose of securing a higher tax, and (b) that a conclusive presumption is lawful where its purpose is to avoid evasions of the taxing statutes. Thus Mr. Justice Roberts said:

> "What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.
>
> The court below assigned two reasons which it thought removed the constitutional objections to the application of the statute in the instant case. It cited and followed the Income Tax Cases, 148 Wis. 456, where the statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this court in Schlesinger v. Wisconsin, 270 U. S. 230, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we can not agree. In the Schlesinger case this court held invalid a statute which, for the purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death. To the argument of the necessity for such classification to prevent frauds and evasions, it was answered:
>
> 'That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B." Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny

due process of law or the equal protection of the laws for any purpose whatsoever.'

The claimed necessity can not justify the otherwise unconstitutional exaction."

And again, in an earlier part of the opinion, it was said:

"That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U. S. 531, 540.)"

Fifth Amendment Applies to Taxing Power of Congress.

In the case now before this Court death put no seal upon the gift by the donor to his children; it relieved the subject of the gift of no burden, for none had been imposed upon it by the donor; it gave to the donees no greater estate, no enjoyment more perfect or precise. The grantor passed no property or interest in the securities at his death. There was no privilege of inheritance which might be assessed. The beneficiaries of the estate upon whom the burden fell had no right of succession in the corpus of the *inter vivos* trust and gift on which an excise could attach. The corpus of the estate received no enrichment. If the value of the property had enhanced fortuitously or by reason of the acts of the donee himself after the date of the gift, the increased value would entail a greater tax burden upon the estate and its beneficiaries; that is, upon persons who had no benefit from the property and no interest in its increase.

To tax the estate, therefore, is so arbitrary and capricious as to amount to confiscation, and is consequently forbidden by the Fifth Amendment.

Nichols v. *Coolidge, supra,* at p. 542.
Tyler v. *United States, supra,* at p. 504.
Brushaber v. *Union Pacific R. R.,* 240 U. S. 1, 24.

It is plain from the cases already cited that there is no distinction to be made between the applicability of the Fifth Amendment to the taxing power of Congress and

that of the Fourteenth Amendment to the taxing power of the States.

The language in *Nichols* v. *Coolidge* at page 542 is final. It was there said:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77."

The Court recently, in *Tyler* v. *United States, supra,* repeated with approval this application of the Fifth Amendment to the taxing power of Congress, saying:

> "The possibility that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 24, and cases cited; *Nichols* v. *Coolidge*, 274 U. S. 531, 542—." * * * *"* *

It is to be noted that these statements were made apropos the unequal and arbitrary exercise of the taxing power which was the true basis of decision in the *Nichols* and *Tyler* cases, and not in connection with retroactivity as has been contended by the Government.

And in *Saltonstall* v. *Saltonstall, supra,* which arose under the Massachusetts succession tax law, and *Chase National Bank* v. *United States, supra,* arising under the Federal estate tax law, we see a further example of similarity in application of the two amendments.

See also *Frew* v. *Bowers*, 12 Fed. (2d) 625, decided by the Circuit Court of Appeals, Second Circuit.

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* Although the Court had before it the tenancy by the entirety subdivision of Section 302, its language was general and is clearly applicable to the case in hand.

Milliken Case Distinguished.

As we have said, there is one exception to the rule that an Estate Tax can only be imposed upon the passing, termination or ripening of an economic benefit at death. That exception is where a gift has been made in contemplation of death and the tax is imposed for the purpose of preventing an evasion.

Milliken v. *United States,* 283 U. S. 15.

See also *dicta* in *Nichols* v. *Coolidge, supra,* at page 542, and *Tyler* v. *United States, supra,* at page 505.

It is clear from the *Milliken* case that this Court sustained that part of Section 402 (c) in the Act of 1918 which is similar to the first sentence of Section 302 (c) in the Act of 1926, on the ground that although nothing passed at death by the gift itself, it was by nature a testamentary act, the prospect of death being the motivating cause. It treated gifts made in contemplation of death as though they were gifts *causa mortis,* to take effect upon death. **It was the act of the donor himself that related the gift to his death, not Fate or the procession of months and years.** Making the *intention* of the grantor rather than the status or shift of property interests the basis of taxation is an anomaly; and yet **the very act of taxing such gifts made for equality** in the *Milliken* case. Thus Mr. Justice Stone said at page 23:

> "It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such disposition without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid

> of, and an integral part of, the legislative scheme of taxation of transfers at death. Decedent's gift as a substitute for a testamentary disposition was thus brought within the operation of the 1916 Act taxing such gifts on the same basis, with respect to rate and valuation, as transfers of property at death. Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them."

It is evident, therefore, that the Court regarded the gift, which was truly made in contemplation of death, to be *a substitute for a testamentary gift* the motivation of which was a reasonable apprehension of death, not an apprehension in any vague way as where one thinks "some day I shall die," but that apprehension which is present when one is in the frame of mind to make a will with the desire to settle his temporal affairs.

United States v. *Wells*, 283 U. S. 102.*

The vital distinction between the gift in contemplation of death in which there is a definable relation between death, and the true gift *inter vivos* which properly belongs only in a genuine gift tax, has been succinctly stated by this Court in *United States* v. *Wells*, at page 118:

> "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which sprang from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed."

* See *United States* v. *Wells*, 283 U. S. 102, defining "transfers in contemplation of death" as those made with a reasonable apprehension of death as the animating cause of the transfer.

Article XVI, Regulation 70, 1929 Edition, relating to Estate Tax, issued by the Treasury Department.*

In the present case the Trial Court has found (R. 2) the allegation of the complaint that the gift was not made in contemplation of death or to take effect at or after death. Neither the *Milliken* case or its reasoning are therefore applicable.

Not only is the *Milliken* case not apposite from the viewpoint of substantive due process, but it is free from objection as to lack of procedural due process, for the estate was given its day in court to contest the fact of contemplation of death.

Procedural Due Process—Denial of Right to Show True Facts.

In the present case the gift was not made in contemplation of death (R. 2). It can in no way be deemed to be an evasion of the Estate Tax. It has not even the color of evasion. To say that a gift was made in contemplation of death, when the contrary was the fact, is on its face arbitrary.† To make it incumbent upon the Commissioner to find a fact contrary to the truth, to say that because a gift is not admitted or shown to have been made, or in fact made, in contemplation of death, it must

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*See Article 16 of Regulations 70 (1929 Edition), Relating to Estate Tax, issued by the Treasury Department, which reads as follows:

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property."

And see *Milliken* v. *United States, supra,* and *United States* v. *Wells, supra.*

†In the *Guinzburg* case, *supra,* it was conceded that the gift was made as a wedding present to the donor's son, but it was nevertheless taxed as being in contemplation of death.

nevertheless be deemed to have been made in contemplation of death, is to deprive the taxpayers of due process of law.

This is true irrespective of whether there is substantive due process, that is, whether in fact there be (1) subject-matter to be taxed; and (2) equal classification.

A rule of substantive law cannot be adopted to deny taxpayers procedural due process, to deprive them of their day in court.

Manley v. *Georgia*, 279 U. S. 1.
Keller v. *United States*, 213 U. S. 138.
People v. *Mancuso*, 255 N. Y. 463.
Mobile &c. R. R. v. *Turnipseed*, 219 U. S. 35.

The words of Mr. Chief Justice Hughes in *Bailey* v. *Alabama*, 219 U. S. 219, at pages 238 and 239, are particularly relevant:

> "The power to create presumptions is not a means of escape from constitutional restrictions."

This is not the case of Congress providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue; Congress has not attempted to create a true presumption of the intention of the deceased. It has, on the contrary, precluded rebuttal by providing that where the Government fails to make out a *prima facie* case of a gift made in contemplation of death it shall under the circumstances be deemed to have made out an irrefutable case. In other words, it might be a fair presumption, inspired by experience, that unexplained gifts made within two years of death are made in contemplation of death (*Wickwire* v. *Reinecke*, 275 U. S. 101), but to adopt such experience as a rule of substantive law, permitting of no rebuttal to show that such a gift was in fact not made in contemplation of death, is confiscatory. As well say by congressional fiat that the title to the house is not now in the donee but in the Government.

The Court said in *Manley v. Georgia, supra:*

> **"Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."**

That Congress did not intend to place the burden of proof on the taxpayer *but to eliminate the possibility of any proof* is demonstrated by comparing the sentence under consideration with the last sentence of Section 302 (c). That created a true rule as to the burden of proof on gifts *inter vivos* where the donor died before February 26, 1926. Such gifts within two years of death are only to be deemed to have been made in contemplation of death "unless the contrary is shown."*

II.

The tax assessed on the gift by the decedent to his son is not a gift tax, or if a gift tax is not valid as such.

We have shown under Point I that the tax assessed against this estate is not merely a tax included in the Estate Tax Act but is an integral part of the Estate Tax itself. The gift is included in the gross and net estates and the amount of the tax is fixed by the sum total of the net estate of which the value of the gift at the date of death is a component.

If it were a gift tax it would be arbitrary.

(a) The gift made by Mr. Donnan would be taxed because he died within a specified period; but an equal contribution made by another person at the same time and for the identical purpose would not be taxed because the donor survived the two-year period. This situation is splendidly illustrated in the *Guinzburg* case, *supra.*

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* To this effect is the House Report on the proposed Revenue Act of 1926 (69th Congress, 1st Session, Report No. 1, p. 15).

It was attempted to sustain the statute in *Schlesinger* v. *Wisconsin, supra,* by urging that it was a gift tax. The argument was disposed of by this Court as follows:

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of the opinion that such a classification would be in plain conflict with the Fourteenth Amendment."

(b) Apart from the foregoing vice of arbitrary classification, this, if viewed as a gift tax, would suffer from another violation of substantive due process. The tax here is plainly based upon the value of the property at the death of the donor—at a time when it is concededly the property of the donee. The tax is thus not based upon the value of the gift at all or upon any value that relates to the donor's own substance. It is apparent, therefore, that the tax rests upon an arbitrary basis, for it makes one individual pay for what another has. It must follow, under the authority of the *Hoeper* case, *supra,* that the tax is bad. Indeed, it was this thought which pressed the Supreme Court in *Nichols* v. *Coolidge* to declare the tax there under scrutiny to be arbitrary, and which led Mr. Justice Learned Hand in *Frew* v. *Bowers* to characterize the levy before him as "whimsical" and contrary to the Fifth Amendment. From the earliest day it has been clear that a tax cannot be made the means of putting upon one man the burden that should be borne by another (*United States* v. *B. & O. Railroad Co.,* 17 Wall. 322).

Nor is there any constitutional justification, if this be viewed as a gift tax, for merging the gift under consideration into the mass of the estate of the decedent. How is the estate related to the tax if this be a gift tax pure and simple? The tax is measured upon a basis wholly unconnected with the *inter vivos* distribution of wealth, which is the subject-matter of a gift tax. To bring the estate

into the picture is to do something so entirely unrelated as to make the imposition clearly arbitrary. To measure the burden by the size of the estate is also to do something that has none of the rational attributes of a real gift tax. And on this separate ground, substantive due process would be violated.

(c) It is invalid to tax a gift where the tax cannot be foreseen, where the taxpayer's right to know when and how he becomes liable for taxes has not been observed (*Untermyer* v. *Anderson*, 276 U. S. 440). Consequently a gift tax which becomes operative only upon the happening of an event, viz., death, the time of occurrence of which cannot be fixed or foreseen, must be void.

And it is idle to argue that the taxpayer might have anticipated a tax if he died within the period—for the gift was not made with death in mind. Contemplation of death was not an operative factor by definition. If death had been in his contemplation the tax would have been assessed under the first sentence of Section 302 (c) and the $5,000 deduction provided for in the second sentence of the section would not have been allowed. (See *Schlesinger* v. *Wisconsin*, *supra*, at pages 239, 240.*)

This is sufficient to distinguish the present case from *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160. There could be no "knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedents' estates, was an essential part of the system." At most, the donor would know that it might be so taxed if a certain contingency occurred. This is not sufficient to justify the tax (*Untermyer* v. *Anderson*, *supra*).

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*The gift tax (Chap. 234, §319, 43 Stat. 313; U. S. C. A., Title 26, §1131) was repealed by the Revenue Act of 1926 (Chap. 27, 44 Stat. 125; U. S. C. A., Title 26, §1131) on February 26, 1926. This was three days before the opinion was handed down in the *Schlesinger* case. Congress could, therefore, not have adopted Section 302 (c) with any intention to avoid the unconstitutional features of an estate or inheritance tax by substituting a new gift tax.

Bromley v. *McCaughn*, 280 U. S. 124, is no authority for supporting as a gift tax such a tax as was here assessed. In the first place, there the fact of the levy of a tax was certain at the time of the gift. Secondly, the tax was measured by the value of the property at the time of the gift, at the time of the exercise of an incident of ownership, and not as of a different time. Thirdly, the tax was computed on the basis of the amounts of the gifts themselves, and not by incorporating the subject-matter of the tax with other property or the exercise of dominion over other property (cf. *Hoeper* v. *Tax Commission of Wisconsin, supra*). Finally, the opinion in the *Bromley* case did not purport to deal with the question of arbitrary classification here involved.

Respectfully submitted,

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Amicus Curiae.